6 April 1982

LEGAL ASPECTS OF EXPORT CONTROLS
FOR THE INTELLIGENCE COMMUNITY

I. United States Export Controls

A. Export Administration Act of 1979 (50 U.S.C.A. § 2401-20)

1. National Security Controls (50 U.S.C.A. § 2404)

-- For goods and technology that would make a significant contribution to the military potential of any country that would be detrimental to United States national security.

2. Foreign Policy Controls (50 U.S.C.A. § 2405)

-- To further significantly the foreign policy of the United States or to fulfill declared international obligations.

3. Short Supply Controls (50 U.S.C.A. § 2406)

-- To protect the domestic economy from drain of scarce materials and to reduce inflationary impact of foreign demand.

4. Implementation - Commodity Control List (15 C.F.R. 399)

5. Licensing Requirements (15 C.F.R. 370)

-- Definition of types of licenses

-- Definition of country groups

-- General requirements

6. Violations (50 U.S.C.A. § 2410)

-- Generally five years and $50,000

-- Ten years and $50,000 for willful violations with knowledge that exports will be used to the benefit of a foreign country subject to national security or foreign policy controls.

B. International Security Assistance and Arms Export Control Act of 1976 (22 U.S.C. § 2778)

1. Provisions of this act require a license pursuant to regulations to control the export of defense articles and defense services. Defense articles and defense services designated by the President constitute the United States Munitions List.

2. The United States Munitions List (22 C.F.R. 121)

3. License Requirements (22 C.F.R. 123)

4. Violations - Two years imprisonment or $100,000 fine or both.

C. The Atomic Energy Act, as amended (42 U.S.C. §§ 2077, 2092, 2111, 2122, and 2131)

1. The various provisions of this act prohibit the export of uranium and other source materials, special nuclear material, by-product material, production and utilization facilities, and component parts of such facilities without a license from the Nuclear Regulatory Commission.

2. License Requirements (10 C.F.R. 110)

3. Violations (42 U.S.C. § 2272)

-- Generally, ten years imprisonment or $10,000 fine or both.

-- If violation is with intent to injure the United States of to advantage any foreign nation, punishment may be any term of years up to life imprisonment or $20,000 fine or both.

II. Intelligence Community/Export Control Community Interface

A. Obligation to Report Crimes (E.O. 12333, § 1.7(a))

B. Intelligence Dissemination Requirements Generally (E.O. 12333, §§ 1.5(r), 1.8(a), 1.11(b), and 1.12(a)-(d))

C. Protection of Intelligence Information and Intelligence Sources and Methods

1. Third-Agency Rule Under E.O. 12356

2. Information Controlled by Originator (ORCON) (DCID 1/7)

3. Intelligence Community/Export Control Community Procedures to Protect Classified Intelligence Information - CAN'T PREDICT ALL ISSUES/PROBLEMS IN ADVANCE

D. Classified Information Procedures Act (Graymail Act)

Comments -

Export Control Laws

The Arms Export Control Act, 22 U.S.C. § 2778, and the Export Administration Act, 50 U.S.C. App. § 2401, et seq., together regulate the export of sensitive commodities and technology. Under these statutes the executive branch controls the export of military and strategic commodities and technology by requiring a validated license for the export of most defense articles, certain strategic commodities and related technology. Both statutes make it a criminal offense to export controlled commodities or technology in violation of the provisions of the statutes and regulations promulgated thereunder. The Department of State, acting under a delegation from the President, is charged with the responsibility for administering a program to control the commercial export of defense articles and related technology in the interests of national security and foreign policy. The Department of State promulgates the International Traffic in Arms Regulations, 22 C.F.R. § 121.01, et seq. (United States Munitions List). These regulations designate which defense articles and related technologies require a license from State before they can be exported and set up a control scheme under the Act. The United States Customs Service, Department of the Treasury, is charged with responsibility for investigating potential violations of the Arms Export Control Act.

Under the Export Administration Act, the Department of Commerce exercises export control over strategic commodities and technologies. Under the Act, the Secretary of Commerce and the Secretary of Defense have established and maintained a list of militarily critical goods and technologies which is called the Commodity Control List. These national security controls are designed to restrict or control exports which might contribute to the military potential of another nation in a manner detrimental to our national security. The Compliance Division of the Office of Export Administration, Department of Commerce, is charged with the responsibility for investigating potential violations of the Act.

The export control laws do not inhibit the carrying out of the Agency's counterintelligence mission. The primary utility of these laws with respect to this mission is that they, like certain counterintelligence operations, are designed to control the export of those commodities or that technology which is, or may have been, the object of a hostile intelligence service's covert procurement operations in the United States. Amendment of the export control laws is unnecessary at this time; the existing language provides for intelligence community input if and when intelligence agencies develop evidence of a potential violation of these laws.

June

Foreign Investment

Over the past seven or eight years, foreign investment in the United States has increased dramatically. The magnitude of this foreign investment has raised concerns that foreign nations, business enterprises dominated by foreign nationals or governments, and nationals of other countries will gain the power to affect directly those sectors of the United States economy upon which the national security depends. See Memorandum for the General Counsel on the subject of Weaknesses in the U.S. Industrial Base, dated 3 December 1981, at 4. This power in the hands of hostile intelligence services could greatly increase their ability to run certain sorts of operations against us, thus increasing dramatically the counterintelligence burden placed upon the U.S. intelligence community. Domestic laws regarding foreign investment in the United States consist of

> statutes which give the President extraordinary economic powers in emergencies, statutes which restrict foreign investment in certain economic activities, and statutes and Executive Orders providing for limited monitoring of certain types of investments. However, these statutes and Executive Orders do not provide the [F]ederal [G]overnment with a regular, comprehensive mechanism through which to determine whether existing and potential foreign investments in the United States are consistent with the national security and to prohibit those which are not.

Id. at 4. One possible means of combating this shortcoming would be to enact legislation which would grant to the President, or to whomever he appointed with the advice and consent of the Senate, broad authority to screen foreing investments in the United States, and to determine which are inconsistent with, or damaging to, the national security. Any such legislation would have an impact much broader than merely its counterintelligence implications and thus will require analysis by non-intelligence community, as well as intelligence community, interests.

Espionage

The espionage statutes, 18 U.S.C. § 792, et seq., in essence prohibit the gathering, transmitting or delivering of defense information to aid a foreign government or nation, knowing and willful disclosure of classified information to an unauthorized person, and the publication or use "in any manner prejudicial to the safety or interest of the United States or for the benefit of any foreign government to the detriment of the United States" particular categories of classified information. These statutes are not altogether clear on their face, thus making their utilization difficult even in a classic espionage case; i.e., that involving clandestine dealings with foreign agents. However, "most of the uncertainties in this regard have been sorted out in the course of repeated prosecutions and through a process of judicial interpretation." Prepared Statement of Anthony A. Lapham, General Counsel, Central Intelligence Agency, Before the House Permanent Select Committee on Intelligence, 24 January 1979, at 5. See also id. at 6. Amendment of these statutes would not necessarily solve, or even ameliorate, the primary problem, which is that these statutes simply are not enforced to the limits of their applicability. While this fact does inhibit the CIA counter-intelligence mission over the long run, amendment of these statutes would have little, if any, direct effect on this problem and, thus, their utility.

FOIA

The Freedom of Information Act, while on the whole not compatible with either the U.S. counterintelligence or intelligence collection mission, does provide a narrowly drawn area of protection for the intelligence community. Section 552(b)(1) allows the Agency to protect matters which are specifically authorized under criteria established by Executive Order 12065 to be kept secret in the interest of national defense or foreign policy and which are in fact currently and properly classified. Section 552(b)(3) pertains to information exempt from disclosure by statute. The relevant statutes are subsection 102(d)(3) of the National Security Act of 1947, as amended, 50 U.S.C. 403(d)(3), which makes the Director of Central Intelligence responsible for protecting intelligence sources and methods from unauthorized disclosure; and section 6 of the Central Intelligence Agency Act of 1949, as amended, 50 U.S.C. 403g, which exempts from the disclosure requirement information pertaining to the organization, functions, names, officials titles, salaries or numbers of personnel employed by the Agency.

Both of these sections, 5 U.S.C. § 552(b)(1), (b)(3), enable the Agency to better carry out its counterintelligence mission by restricting the information that would otherwise be made available to hostile intelligence services under the FOIA. However, we cannot judge with accuracy how much the information obtained via sanitized documents is actually helping hostile intelligence services to undermine our counterintelligence and intelligence collection mission. It is possible that these hostile services are able to utilize the information released under the FOIA to put together a mosaic far more complete and accurate than we believe is likely given the care with which deletions are made. In addition, the very fact that sensitive information is subject to public, and therefore also hostile services, access under the FOIA makes foreign intelligence services (liaison) reticent to share vital information with us. This hesitance has resulted in a perceptible diminution of the flow of useful liaison information.

Posse Comitatus

The Posse Comitatus Act, 18 U.S.C. § 1385, forbids use of military forces for law enforcement purposes. The original objective of this Act was to put an end to the use of federal troops to police state elections in the South during reconstruction. See U.S. v. Hartley, 486 F. Supp. 1348, 1356 (D.C.M.D.Fla. 1980). Prohibition of direct active use of federal troops to aid in the execution of civilian laws continues to be the purpose of this law. Passive activities of military authorities which incidentally aid civilian law enforcement are not precluded. See State v. Nelson, 260 S.E.2d 529; cert. denied 446 U.S. 929 (1979). CIA use of one or several military officers or enlisted men or women in the carrying out of our counterintelligence mission would not violate this Act, because any impact on, or assistance to, law enforcement would be incidental to the primary purpose for which such counterintelligence activities are carried out. The Posse Comitatus Act does not constrain CIA counterintelligence operations and therefore amendment of this Act would be an unnecessary undertaking at this point.

Foreign Agents Registration Act

The Foreign Agents Reigstration Act of 1938, as amended, 22 U.S.C. § 611, et seq., places primary emphasis on the "protection of the integrity of the decisionmaking process of our Government and on the public's right to identification of the sources of foreign political propaganda." U.S. Department of Justice, Criminal Division, The Foreign Agents Registration Act of 1938, as Amended, and the Rules and Regulations Prescribed by the Attorney General, at 1. The Act aids the Agency in the fulfillment of its counterintelligence mission because it requires the disclosure of potentially harmful foreign contacts or operations.

The Act provides, in general, that individuals and firms must disclose their relationship with foreign governments, foreign political parties, and other foreign principals as well as the political and propaganda activities undertaken on behalf of those foreign principals. Mere acting on behalf of foreign interests does not, however, necessarily subject a person to the requirements of the Act. Applicability depends upon whether or not the person involved meets the definition of an "agent of a foreign power." Any person who engages in the enumerated activities as an agent and who is not exempt under section 613 is required to register with the Attorney General. In sum, the Act requires public disclosure by persons acting for or in the interests of foreign principals where their activities are political in nature or border on the political. An agent would be considered to be engaged in political activity when advice is given or assistance rendered to a foreign principal with the intent to influence U.S. Government policy. All private and nonpolitical activities with a bona fide commercial purpose are exempt from disclosure, and attorneys are not required to register when they engage in legal representation of a foreign principal before the Government if they disclose the principal's identity. See Memorandum for the General Counsel on the subject of the Foreign Agents Registration Act, dated 1 September 1981.

This statute has formed the basis for ~~many~~ prosecutions of foreign nationals charged with conducting intelligence operations in the United States. Its amendment would not, however, increase its utility as a counterintelligence tool. Those individuals and firms currently acting in coordination with hostile intelligence services, as well as those who may so act in the future, are unlikely to register with the U.S. Government no matter how broad or how specific the language of applicable statutes may be.